

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RED ROCK COMMUNICATIONS, INC.,)
a Nevada Corporation,)

Plaintiff,

V.

AMERICAN TELECASTING, INC., a
Delaware corporation;

SUPERCHANNELS OF LAS VEGAS.

INC., an Arizona corporation; ROBERT

HOSTETLER; DONALD R. DEPRIES

CFW COMMUNICATIONS

FOUNDATION; CFW

COMMUNICATIONS COMPANY; M

INVESTORS, L.P.; DOES 1 through 10

and ROE CORPORATIONS 1 through

Defendants.

CV-S-01-0611-PMP (LRL)

ORDER

AMERICAN TELECASTING, INC., a
Delaware corporation.

Counterclaimant,

RED ROCK COMMUNICATIONS, INC.
a Nevada Corporation,

Counterdefendant.)

Presently before the Court is Defendant American Telecasting, Inc.'s ("ATI")

Objection to Special Master Report (Doc. #309), filed on August 8, 2006, and Errata [Doc. #314] thereto filed on August 16, 2006. Also before the Court is Plaintiff Red Rock

1 Communications, Inc.'s ("Red Rock") Limited Objection to Special Master's Report (Doc.
2 #310), filed on August 8, 2006. The parties filed their respective Responses (Doc. #315,
3 #316) on August 16, 2006. The Court held a hearing on these objections on August 29,
4 2006.

5 **I. BACKGROUND**

6 The parties are familiar with the factual background out of which this dispute
7 arises, and the Court will not recount it here. It suffices to state the parties dispute the
8 calculation of certain excess cash contributions, management fees, and interest thereon that
9 ATI charged to Red Rock upon Red Rock exercising the put option in the Shareholders'
10 Agreement to offset the amount ATI owed Red Rock for Red Rock's shares in
11 Superchannels of Las Vegas ("SCLV").

12 Over one year ago, on August 23, 2005, this Court entered an Order (Doc. #229)
13 addressing ATI's motion to reconsider (Doc. #218) a prior Court Order (Doc. #213)
14 denying ATI's original motion for summary judgment (Doc. #133) on its claim that ATI's
15 excess cash contributions, deferred management fees, and interest thereon exceeded and
16 offset the amount ATI owed to Red Rock on the put option sale under the Shareholders'
17 Agreement. In doing so, the Court found, after a series of motions for reconsideration, that
18 genuine issues of material fact remained regarding the setoff calculation.

19 In moving the Court to reconsider its denial of summary judgment, ATI asked the
20 Court to appoint a special master under Federal Rule of Civil Procedure 53 to resolve this
21 complex computation of the appropriate setoff to which ATI is entitled. Red Rock
22 previously had indicated its desire to appoint a special master. In a joint motion for
23 clarification and instructions to the special master (Doc. #238), the parties stated their
24 positions regarding the scope of the issues for the special master to address as follows:

25 Red Rock maintains that the special master is to review all evidence of
26 offsets and management fees, quantify those amounts and then apply
the contractual formula to the totals as set forth in the parties'

1 Amendment to Shareholders' Agreement. Red Rock believes that
2 those amounts should be quantified from the time that excess cash
3 contributions and management fees started being applied, forward
4 through the exercise of the Put Option. The Court can then use those
5 calculations to determine the amount of the offsets, whether the
6 starting point figure set forth in the Amendment should be applied and
when the accrual of management fees should be terminated. Red Rock
maintains that the Amendment defines excess cash contributions
specifically and that the definition conflicts with the "starting point"
figure set out in the Amendment. Red Rock further asserts that none
of these issues have been or are subject to summary adjudication.

7 . . . ATI maintains . . . the Special Master's calculation must
8 commence with the "starting point" figure of \$1,198,816.18 contained
9 in Section 5 of the Amendment to Shareholders' Agreement. From
10 there, the Special Master may only consider evidence on the amount of
contributions made and fees incurred after September 30, 1998, and
apply those amounts to the formula contained in the Amendment to
Shareholders' Agreement. The Special Master may not consider new
challenges to discrete set-offs that were not specifically made during
briefing on ATI's Motion for Summary Judgment, as ATI's
entitlement to said set-offs has already been summarily adjudicated by
this Court in its previous orders.

13
14 (Resp. to Order of Aug. 24, 2005 & Joint Mot. for Clarification & Request for Instructions
15 to Special Master at 2.)

16 On October 5, 2005, the Court entered its Order on the joint motion for
17 clarification as follows:

18 Because Red Rock challenged only specific setoffs at the summary
judgment stage, Red Rock may not now challenge the basis and
propriety of every setoff and management fee before the special
master. However, at issue in this case is whether ATI improperly
included \$600,000 in the setoff calculation. Thus, to the extent ATI
will need to establish that the disputed \$600,000 is not included in the
setoff, ATI should be prepared to prove what each charged setoff
represents.

22 . . . ATI also has insisted that the \$600,000 is not included in
23 ATI's offered calculation, either in the setoffs or in the starting point
figure. ATI should be prepared to offer proof establishing that fact
24 before the special master.

25 (Order [Doc. #239] dated Oct. 5, 2005 at 2.)
26

1 The proceedings before the Special Master lasted several months during which
2 this case effectively was stayed. On July 14, 2006, Special Master Swarts filed his First
3 Report to the Court (Doc. #299). That same day, the Court entered an Order (Doc. #298)
4 which in part addressed Red Rock's motion to compel ATI to provide the special master
5 evidence substantiating each of its claimed offsets. In denying Red Rock's motion to
6 compel, the Court stated:

7 The Court will not direct ATI to produce any particular evidence
8 before the Special Master. ATI has moved for summary judgment
9 and bears the burden of establishing no genuine issue of material fact
exists and that it is entitled to judgment as a matter of law. See Fed.
10 R. Civ. P. 56. To the extent ATI fails to submit sufficient evidence to
meet this burden, the result will be denial of its motion for summary
judgment, and the parties will proceed to trial on the offset issue.

11 (Order [Doc. #298] dated July 14, 2006 at 5.)

12 In his Report, Special Master Swarts indicated that he did not examine the
13 parties' books and records to determine the submitted data's veracity. (Special Master's
14 First Report to the Ct. at 1-2.) He considered whether the disputed \$600,000 still remained
15 in the calculation as well as when ATI should have ceased charging Red Rock for
16 contributions and management fees, and prepared three different computations using
17 different assumptions, each of which he calculated with no compounding of interest. (Id.)

18 With respect to his first calculation, reflected in Exhibit A to his Report, Special
19 Master Swarts used ATI's data on excess cash contributions and deferred management fees
20 to determine total amounts due by November 30, 2002 (the date he suggests the put option
21 sale should have closed); June 30, 2002 (the date Red Rock exercised the put option); and
22 September 30, 2004 (the final month of data ATI provided). (Id. at 2-3.) Exhibit A thus
23 represents Special Master Swarts' calculations using ATI's numbers, including the disputed
24 \$600,000 in the starting point figure, and comparing ATI and Red Rock's alternative
25 methods of calculating offsets. (Id. at 4-5.) Special Master Swarts indicated his normal
26 practice would be to compute amounts as of the actual closing date, but because there is no

1 actual closing date, the issue remains open. (Id. at 3.) However, he suggested the logical
2 date in this instance would be the theoretical closing date of November 30, 2002. (Id.) As
3 of that date, ATI's method of calculating offsets under Section 13 of the Amendment
4 amounts to \$2,701,260.15 while Red Rock's amounts to \$1,332,093.29. (Id. at 4.) Special
5 Master Swarts explained the discrepancy between these amounts arises from the parties'
6 dispute over whether the Section 13(d) percentage applies to total contributions as ATI
7 posits or whether ATI's raw data must be converted to Section 13(a)'s defined term of
8 excess contributions before applying the percentage as Red Rock asserts. (Id.)

9 With respect to the disputed \$600,000, Special Master Swarts found ATI "failed
10 to prove" the disputed amount was not included in the starting point figure. (Id.) He noted
11 that although ATI presented evidence supporting its new argument that ATI properly
12 charged Red Rock for the \$600,000 as a SCLV obligation, resolution of that question was
13 outside the scope of his review. (Id.) Exhibit B thus represents Special Master Swarts'
14 calculations deleting the \$600,000 from the starting point figure based on his finding that the
15 \$600,000 was included in the starting point figure. (Id. at 5-6.) Deleting this from the
16 starting point figure leaves an adjusted starting point figure of \$295,720.69 as of September
17 20, 1998. (Id.) Swarts further recommended management fees cease to be charged to Red
18 Rock as of the closing date of November 30, 2002, the proposed closing date. (Id.)

19 As reflected in Exhibit B, ATI's calculations after subtracting the \$600,000 but
20 using ATI's method of applying the percentage results in an offset amount of \$2,094,186.06.
21 (Id.) Using Red Rock's method of first converting total contributions to excess contributions
22 and then applying the percentage, the offset amount is \$1,083,634.65. (Id.) Special Master
23 Swarts adopted Red Rock's position as the correct method of calculating the offsets. (Id. at
24 7.) "Accordingly, in my opinion, after adjusting the starting contributions by subtracting
25 \$600,000 and converting Contributions to 'Excess Contributions', the mandatory
26 contribution due SCLV by Red Rock using the adjusted data is \$1,083,634.65." (Id.)

1 Special Master Swarts also provided Exhibit C, which begins with a starting
2 point figure of zero. (Id.) Swarts notes he provided Exhibit C to compare his calculations
3 with Red Rock's proffered calculations. (Id.)

4 Turning to the parties' objections to the Report, ATI raises four objections. First,
5 ATI contends the Special Master inappropriately interpreted Sections 13(a) and 13(d) of the
6 Amendment in a manner contrary to this Court's prior rulings on these sections.
7 Specifically, ATI objects to the Special Master taking ATI's total contributions, converting
8 them to excess contributions under Section 13(a), and then applying the percentage from
9 Section 13(d). According to ATI, this exceeded the scope of the Special Master's referral
10 and contradicts this Court's prior ruling on ATI's initial motion for summary judgment that
11 ATI was entitled to apply the percentage as it had. Second, ATI contends this Court should
12 enforce the contractually agreed upon starting point figure. ATI asserts that to avoid a
13 potential issue of material fact for summary judgment purposes, ATI attempted to
14 demonstrate the \$600,000 was not in the starting point figure, but ATI since has uncovered
15 evidence demonstrating it properly charged the \$600,000 to Red Rock all along.
16 Accordingly, ATI objects to removing the \$600,000 from the calculation. Third, ATI
17 objects to using a cut-off date of November 2002 because Red Rock allegedly has asserted
18 shareholder interests beyond that date. Finally, ATI asserts it continues to lose interest on
19 capital contributions and deferred management fees beyond November 2002 for which the
20 Special Master did not account.

21 Red Rock also lodges four objections to the Special Master's Report. First, Red
22 Rock contends Exhibit C, not Exhibit B, is the correct calculation because Red Rock
23 contributed \$462,000 to SCLV in 1997, which set the parties' capital contributions at
24 relatively equal to their proportionate ownership interests as of September 1998. Red Rock
25 thus argues that as of the starting date, the balance of "excess" contributions was zero, as
26 opposed to the \$295,720.69 in Swarts' Exhibit B. Second, Red Rock disputes Special

1 Master Swarts' application of management fees through November 2002 even though Red
2 Rock exercised its put option in June 2002. Red Rock notes that because it would not
3 benefit from any increased stock value as of June 2002, it concomitantly should not be
4 charged for management fees incurred or capital contributions made after that date. Third,
5 Red Rock argues it should not be charged for management fees and excess cash
6 contributions after September 1999 because after Sprint acquired ATI, ATI unilaterally shut
7 down SCLV's operations to Red Rock's detriment. Finally, Red Rock argues the 17%
8 interest rate charged to Red Rock should have been adjusted downward as interest rates
9 dropped generally, particularly because ATI advanced funds to SCLV without corporate
10 consideration or approval by SCLV.

11 Although much has intervened, ultimately this issue still is before the Court on
12 ATI's motion for summary judgment in which it argued that because Red Rock owed more
13 in offsets than ATI owed for the put option price, no genuine issue of fact remained that Red
14 Rock must disgorge its SCLV shares to ATI with no sums due and owing from ATI to Red
15 Rock.

16 **II. OBJECTIONS TO THE SPECIAL MASTER'S REPORT**

17 **A. EXCESS CONTRIBUTION CALCULATION**

18 The Court will grant ATI's objections to the Special Master's interpretation of
19 Sections 13(a) and (d) of the Amendment to the Shareholders' Agreement. This Court
20 previously entered two Orders indicating ATI properly applied the Section 13(d) percentage.
21 (Order [Doc. #170] dated Nov. 18, 2004 at 36; Order [Doc. #193] dated March 31, 2005 at
22 6.) In its initial Order on summary judgment of November 18, 2004, the Court stated
23 “[u]nder the Amendment's plain language, ATI was entitled to calculate Red Rock's share
24 as 70% of the excess cash contributions.” (Order [Doc. #170] at 36.) However, the parties
25 continue to dispute the definition of what constitutes an excess cash contribution to which
26 that percentage would apply.

1 Section 13(a) of the Amendment defines the term “Excess Cash Contributions” to
 2 mean “the amount at such time of unreimbursed cash contributions by ATI or Red Rock
 3 which are in excess of such party’s then existing stock ownership percentage in SCLV.”
 4 (App. to Red Rock’s Summ. J., Opp’ns [Doc. #141], Ex. A, Attach. 4 at 16.) Section 13(d)
 5 then provides ATI is entitled to charge Red Rock for “a fraction, the numerator of which is
 6 the Red Rock Percentage and the denominator of which is 100 minus the Red Rock
 7 Percentage, multiplied by the then applicable Excess Cash Contribution.” (*Id.* at 17.) The
 8 Agreement states the fraction, which equates to approximately 70%, is multiplied by the
 9 Excess Cash Contribution, a term defined within Section 13(a).

10 ATI argues every dollar it contributed beyond its proportionate share was “in
 11 excess” of its then existing equity interest. For example, if ATI contributed \$100, ATI
 12 argues \$100 was in excess of its then existing proportionate share. In contrast, Red Rock
 13 argues only forty-two cents of every dollar ATI contributed were “in excess” of ATI’s then-
 14 existing fifty-eight percent share. For example, if ATI contributed \$100, only \$42 of that is
 15 in excess of ATI’s fifty-eight percent share.

16 The “purpose of contract interpretation is to determine and enforce the parties’
 17 intent.” US West Communications, Inc. v. Ariz. Corp. Comm’n, 915 P.2d 1232, 1235 (Ariz.
 18 App. Div. 1 1996).¹ In interpreting a contract, the Court must determine whether the parties’
 19 agreement is ambiguous. McDaniel & Assoc. v. Merodias Constr. Co., Inc., 585 P.2d 266,
 20 268 (Ariz. App. 1978). Whether the contract is ambiguous is a question of law for the
 21 Court. Chandler Med. Bldg. Partners v. Chandler Dental Group, 855 P.2d 787, 791 (Ariz.
 22 App. Div. 1 1993). If the agreement’s language is plain and unambiguous, the Court applies
 23 the contract as written. *Id.* However, when the contract’s terms are reasonably susceptible

24
 25 ¹ The Shareholders’ Agreement specifies that it “shall be governed, construed and enforced
 26 in accordance with the laws of the State of Arizona.” (App. to Red Rock’s Summ. J., Opp’ns [Doc.
 #141], Ex. A, Attach. 3 at 11.)

1 to more than one interpretation, extrinsic evidence is admissible to determine the parties' 2 true intent. Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1140 (Ariz. 1993). 3 Determining the parties' true intent or the circumstances that may elucidate ambiguous 4 language may require fact finding by the trier of fact. US West Communications, Inc., 915 5 P.2d at 1235; Ash v. Egar, 541 P.2d 398, 401 (Ariz. App. 1975). When interpreting a 6 contract, "a court may consider surrounding circumstances, including negotiation, prior 7 understandings, and subsequent conduct[.]" Taylor, 854 P.2d at 1139. Where a party offers 8 extrinsic evidence to determine the meaning of contractual language, the court first must 9 consider the offered evidence that allegedly "illuminate[s] the meaning of the contract 10 language, or demonstrate[s] the parties' intent," and determine whether such evidence has 11 any probative value in determining the parties' intent. Id. (citing 3 Corbin § 542, at 100-01 12 (1992 Supp.)). Next, the court interprets the contract subject to the parol evidence rule's 13 preclusion of extrinsic evidence that would vary or contradict the meaning of the written 14 agreement's terms. Id. Although the parol evidence rule would seem to bar offering 15 extrinsic evidence regarding the parties' intent,

16 [t]he meaning that appears plain and unambiguous on the first reading
17 of a document may not appear nearly so plain once the judge
18 considers the evidence. In such a case, the parol evidence rule is not
violated because the evidence is not being offered to contradict or
vary the meaning of the agreement. To the contrary, it is being
offered to explain what the parties truly may have intended.
19

20 Id. at 1140. For example, where the parties "use language that is mutually intended to have a
21 special meaning, and that meaning is proved by credible evidence, a court is obligated to
22 enforce the agreement according to the parties' intent, even if the language ordinarily might
23 mean something different." Id. at 1139 (citing Restatement (Second) of Contracts § 212
24 cmt. b, illus. 3 & 4 (1979)). In contrast, "a contract may be susceptible to multiple
25 interpretations and therefore truly ambiguous yet, given the context in which it was
26 negotiated, not susceptible to a clearly contradicting and wholly unpersuasive interpretation

1 asserted by the proponent of extrinsic evidence.” Id. at 1140.

2 The contractual language in the Amendment defining “excess cash contribution”
3 is, by itself, ambiguous. It is not clear from the definition itself whether the amount then “in
4 excess” of ATI’s proportionate share is the total amount of the contribution or forty-two
5 percent of that amount. Red Rock and ATI assert diametrically opposed positions on this
6 issue. However, when considered in light of the parties’ expressed intent as specifically
7 stated in the Amendment, the language is unambiguous and susceptible of only one
8 reasonable interpretation. The Amendment states the “parties desire, to the extent possible,
9 that cash contributions by shareholders to SCLV be made in proportion to the shareholders’
10 equity interests in SCLV” (App. to Red Rock’s Summ. J. Opp’n [Doc. #141], Ex. A,
11 Attach. 4 at 16.) Only ATI’s proposed definition of excess cash contributions effectuates the
12 parties’ intent. For example, if ATI contributed \$100, under ATI’s formulation all \$100 is
13 “in excess” of ATI’s share. Under Section 13(d), the 70% multiplier is applied to the \$100,
14 for Red Rock’s contribution amount of \$70. This makes for a total contribution from both
15 parties of \$170. This works out roughly to the parties’ relative equity interests, as ATI
16 would have contributed \$100, which amounts to approximately fifty-eight percent of \$170
17 (\$170 x .58 = \$98.60), and Red Rock would have contributed \$70, which amounts to
18 approximately forty-two percent of \$170 (\$170 x .42 = \$71.40).

19 Red Rock’s proposed methodology does not effectuate the parties’ expressly
20 stated intent. Under Red Rock’s method, if ATI contributed \$100, only \$42 of that amount
21 would be in excess of ATI’s proportionate equity interests. Red Rock then would multiply
22 that amount by the 70% multiplier, resulting in Red Rock’s contribution being only \$29.
23 That would amount to a total contribution from both parties of \$129. Of the \$129, ATI
24 would have contributed approximately 77% rather than its 58% equity share. Further, Red
25 Rock would have contributed only \$29 when its proportionate equity interest would have
26 required it to contribute \$54.18 (\$129 x .42 = \$54.18).

1 Consequently, Section 13 of the Amendment, when read in its entirety and
2 interpreted to effectuate the parties' express intent, is not reasonably susceptible to more
3 than one interpretation, and is unambiguous. Accordingly, the Court affirms its earlier
4 rulings that, as a matter of law, ATI was entitled to apply the 70% multiplier to all
5 contributions it made in excess of its proportionate share as reflected in ATI's methodology
6 of calculating the setoffs. To the extent the Special Master concluded otherwise, the Court
7 does not adopt his recommendation.

8 This ruling does not resolve the entirety of ATI's motion for summary judgment,
9 however. Even using ATI's methodology, ATI owes more to Red Rock than Red Rock
10 owes to SCLV if the \$600,000 is removed from the starting point figure. Accordingly, the
11 question remains whether the disputed \$600,000 remains in the starting point figure, and, if
12 it does, whether ATI nonetheless is entitled to summary adjudication.

13 **B. The Disputed \$600,000**

14 ATI contends this Court should enforce the agreed upon starting point figure.
15 ATI asserts that to avoid a potential issue of material fact for summary judgment purposes,
16 ATI attempted to demonstrate the \$600,000 was not in the starting point figure, but ATI
17 since has uncovered evidence demonstrating it properly charged the \$600,000 to Red Rock
18 all along. Accordingly, ATI objects to removing the \$600,000 from the calculation. ATI
19 contends the Special Master "concluded" and "agreed" ATI properly charged Red Rock for
20 the \$600,000. (ATI's Objection to Special Master Report [Doc. #309] at 3, 11.) The Special
21 Master made no such conclusion. He noted only that ATI had presented evidence that
22 "supports" its new argument that the \$600,000 was a SCLV obligation with the
23 "implication" that it properly belongs in ATI's capital contributions, but resolving that issue
24 was outside the scope of his referral. (Special Master's First Report to the Ct. at 4.) Red
25 Rock responds that the Special Master correctly determined ATI failed to demonstrate the
26 \$600,000 was not in the starting point figure.

1 The parties agreed in the Amendment to the Shareholders' Agreement that ATI's
 2 excess cash contributions as of September 1998 amounted to \$895,720.69 (\$1,198,816.18 -
 3 \$303,095.49). (App. to Red Rock's Summ. J. Opp'n [Doc. #141], Ex. A, Attach. 4 at 16.)
 4 Rarely will a contractual number to which the parties mutually agreed be ambiguous.
 5 However, here the parties specifically defined the term "excess cash contribution," and
 6 expressly stated their intent was that cash contributions by SCLV's shareholders be made in
 7 proportion to their respective equity interests in SCLV. Given this stated intent, and given
 8 Red Rock's offered extrinsic evidence that ATI had not made \$895,720.70 in excess
 9 contributions properly charged to Red Rock by September 1998, the starting point figure is
 10 ambiguous. It is unclear whether the parties intended to effectuate their stated intent that the
 11 respective contributions be proportionate to equity interests and made a mathematical error,
 12 or whether, regardless of what happened before September 1998, the parties intended the
 13 \$895,720.69 figure to control even if it did not reflect the actual state of the relative
 14 contributions to that date. The parties' intent in this respect is unclear and thus remains a
 15 material issue of fact for the jury. US West Communications, Inc., 915 P.2d at 1235; Ash,
 16 541 P.2d at 401. The Court therefore will deny ATI's objection on this ground.²

17 ATI did not present this evidence or argument until the proceedings before the
 18 Special Master. The Court will not entertain on summary judgment ATI's evidence,
 19 presented at this late date, that the \$600,000 is properly charged to SCLV, and thus to Red
 20 Rock.

21 As reflected in Special Master Swarts' Exhibits B and C, if the starting point
 22 figure does not accurately reflect the parties' intent in the Amendment, even if the Court
 23

24 ² The Court also will deny Red Rock's objection regarding whether Exhibit B or C to the
 25 Special Master's Report accurately reflects the correct amount of the starting point figure, as the Court
 26 is not ruling as a matter of law on that issue. It is for the trier of fact to determine the parties' intent
 regarding the starting point figure.

1 uses ATI's method of calculating excess cash contributions from October 1998 forward, ATI
2 has not established as a matter of law it is entitled to more in offsets than ATI owes Red
3 Rock on the put option sale unless the cutoff date for determining these values extends
4 beyond November 2002.

5 **C. November 2002 Cutoff Date**

6 ATI objects to the Special Master's suggestion of using a cut-off date of
7 November 2002 because Red Rock allegedly has asserted shareholder interests beyond that
8 date. Red Rock responds that the Special Master found in favor of ATI by applying the
9 November 2002 date because the actual cutoff date should be June 2002, when Red Rock
10 exercised its put option. Red Rock argues that because that sale did not go through on
11 November 2002, Red Rock has monitored shareholder meetings because it still held the
12 shares even though the transaction should have been consummated previously. Red Rock
13 notes that because it could not share in any gain in SCLV's value after it exercised its put
14 option, it likewise should not be held to continue to accrue associated costs.

15 Section 13(d) of the Amendment provides that if Red Rock receives money from
16 the sale of its SCLV shares, it "shall immediately contribute to SCLV" its share of the excess
17 cash contributions, deferred management fees, and interest thereon. (App. to Red Rock's
18 Summ. J., Opp'n [Doc. #141], Ex. A, Attach. 4 at 17.) Accordingly, the Amendment
19 specifies the offsets become due upon Red Rock receiving funds from the sale of its shares.
20 Because the put option sale was set to close on November 30, 2002, that is the date Red
21 Rock would have received funds and upon which date it immediately would have been
22 required to fund SCLV. Accordingly, the Court adopts the Special Master's position that the
23 November 2002 date is the cutoff date. After that date, ATI no longer was entitled to charge
24 management fees, excess cash contributions, or 17% interest thereon under the contractual
25 provisions.

1 **D. Interest Beyond November 2002**

2 ATI asserts it continues to lose interest on capital contributions and deferred
3 management fees beyond November 2002 for which the Special Master did not account. To
4 the extent the starting point figure does not reflect the parties' intent, Red Rock may be
5 entitled to interest on the funds for which ATI owes on the put option which it has not paid
6 Red Rock. ATI has failed to present evidence establishing as a matter of law that it is
7 entitled to interest beyond that previously calculated and if so entitled, the amount of such
8 interest combined with the proper offset amount exceeds the put option price plus any
9 interest ATI may owe Red Rock. The Court therefore will deny this objection to the Special
10 Master's Report.

11 **E. Earlier Cutoff Date on Management Fees**

12 Red Rock objects to the Special Master's Report's calculation to the extent it
13 included management fees beyond September 1999, when Sprint purchased ATI and
14 allegedly shut down SCLV's operations. As this Court already ruled, this is not an issue for
15 the offset calculation. (Order [Doc. #239] dated Oct. 5, 2005 at 2-3.) If Red Rock
16 establishes ATI shut down SCLV's operations in breach of its duties to Red Rock, Red Rock
17 may claim improperly charged management fees as damages. However, Red Rock first must
18 prove to a finder of fact that ATI engaged in such conduct. Accordingly, the issue is a
19 matter of damages on Red Rock's surviving claims, not as a matter of the proper calculation
20 of the offsets. The Court therefore will deny this objection.

21 **F. Interest Rate**

22 Finally, Red Rock objects to the use of a 17% interest rate. As this Court
23 previously has ruled, Red Rock contractually agreed to the 17% interest rate in the
24 Amendment. (Order [Doc. #170] dated Nov. 18, 2005.) Accordingly, ATI contractually
25 was entitled to charge the 17% interest rate until November 30, 2002, when the put option
26 sale should have closed. The Court therefore will deny this objection.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant American Telecasting, Inc.'s Objection to Special Master Report (Doc. #309) is hereby GRANTED with respect to ATI's objections regarding the method of calculating excess contributions, and is DENIED in all other respects.

IT IS FURTHER ORDERED that Plaintiff Red Rock Communications, Inc.'s Limited Objection to Special Master's Report (Doc. #310) is hereby DENIED.

8 IT IS FURTHER ORDERED that Defendant American Telecasting, Inc.'s
9 Motion for Summary Judgment (Doc. #133) is hereby GRANTED in part and DENIED in
10 part. The motion is granted as follows: (1) ATI's method of calculating excess cash
11 contributions is, as a matter of law, the correct contract interpretation; (2) the cutoff date for
12 charging any excess cash contributions, deferred management fees, and interest thereon is
13 summarily adjudicated to be November 30, 2002; and (3) ATI is contractually entitled to
14 charge 17% interest on Red Rock's portion of excess cash contributions and deferred
15 management fees through November 30, 2002. The motion is denied with respect to the
16 starting point figure. The issue of the parties' intent regarding the starting point figure is
17 therefore a matter for jury trial.

18 IT IS FURTHER ORDERED that the parties shall proceed with preparation of
19 their trial briefs and proposed jury instructions, and shall file the same not later than
20 Tuesday, September 5, 2006. The parties shall also file by September 5, 2006, a brief Joint
21 Statement of the Case, which the Court will employ to explain the nature of the case to the
22 prospective jury panel during jury selection.

23 DATED: August 30, 2006

Chip M. Davis

PHILIP M. PRO
Chief United States District Judge